

November 27, 2018

## Implementing UNDRIP: some reflections on Bill C-262

By: Nigel Bankes

**Bill Commented On:** [Bill C-262, An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples](#)

This post comments on Bill C-262 adopted by the House of Commons on May 30, 2018. The Bill is currently in the Senate awaiting debate in a very packed fall sitting. The post is based on a presentation that I made to the Conference on [Indigenous Solutions to Environmental Problems](#) held at the Banff Centre, Banff Alberta, November 9 – 12<sup>th</sup> 2018 on the Treaty 7 territory of the Stoney Nakoda First Nation.

Part I offers some preliminary comments on the United Nations Declaration on the Rights of Indigenous Peoples ([Declaration or UNDRIP](#)). Part II describes Canada's bumpy road to the endorsement of the Declaration. Part III examines the subject of latest step in that endorsement, namely the government's support of MP Romeo Saganash's private member's bill, Bill C-262.

My main conclusion is that the Bill strikes a judicious balance between affording the Declaration some immediate "application" in the laws of Canada, and the creation of a process that will, over time, give greater effect to the Declaration within the Canadian legal system and in doing so slowly decolonize Canadian law and the Canadian legal mind. My perception of the balanced nature of the Bill means that I do not share the views expressed by some (see, for example, Dwight Newman and Ken Coates [here](#)) to the effect that the Bill is overly simplistic and will shift a lot more power to the courts.

### Part I: The Declaration

The Declaration was adopted by General Assembly of the United Nations (UNGA) on 13 September 2007 ([A/RES/61/295](#)). For summaries of state comments during the debate see [here](#). The process to develop the Declaration began much earlier in 1985 with the work of the UN Working Group on Indigenous Populations (*sic*), a five-person expert group. The Working Group completed its work on the text in 1993 and responsibility for the draft was then assumed by the Intergovernmental Working Group on the Draft Declaration. This second process was a state-led process rather than an expert-led process, but Indigenous representatives were heavily involved in both processes. At the conclusion of the Intergovernmental Working Group process in 2005, following 11 negotiating sessions, the chair prepared a "compromise text" for submission to the Human Rights Council (HRC).

That text was adopted by a majority vote of the [HRC in June 2006](#). Two of the 47 members of the HRC voted against adoption: Canada and Russia. In the ordinary course, the adopted text would have been forwarded by the HRC to UNGA for its consideration and adoption in that same year (2006). The text was submitted but a group of African states asked that the matter be deferred pending consideration of whether the text would afford an unqualified right of secession

to ethnic groups in African states (see [here](#)). UNGA did vote to defer and the text came back before UNGA in 2007 with the addition of what is now Article 46(1) which provides that:

Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.

That was sufficient to secure the adoption of the text by a majority of 144 states in favour, 4 votes against (Australia, Canada, New Zealand and the United States) and 11 abstentions (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine). All four of the dissenting states have since, with varying reservations, endorsed the terms of the Declaration. Canada's position is considered below.

This is not the place for a detailed review of the preamble and the 46 articles of the Declaration, but four preliminary observations are in order. First, and at a conceptual level, it is best to think of the Declaration as translating and applying general rules and principles of international human rights law (such as the right to self-determination, the right to equality, the right to be free of discrimination and the right to culture) to the particular situation of Indigenous peoples. It does not create new rights. Rather, it seeks to address the particular history of colonization experienced by Indigenous peoples. In light of that, many of the provisions of the Declaration represent customary international law. Second, the Declaration is “a declaration”. It is not a treaty. It is therefore only binding on states as a matter of international law to the extent that particular provisions do constitute customary international law and that must be determined article-by-article on the basis of an assessment of state practice and *opinio juris*. Third, in terms of drafting, much of the text of the Declaration consists of a declaratory statement of a right with a corresponding or correlative duty on the part of the state to take effective measures to ensure that that right can be enjoyed. Finally, the Declaration must be read as a whole including the entirety of Article 46. I have quoted paragraph 1 of Article 46 above. Perhaps equally important is paragraph 2 which makes the point that the Declaration, while recognizing the rights of Indigenous peoples, does not do so at the expense of the rights of others.

2. In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.

## **Part II: Canada's road to endorsing the Declaration**

Canada first signaled a change in its position in November 2010 when the [Harper government endorsed the Declaration](#) albeit indicating that it was an aspirational document that was not legally binding and does not reflect customary law. By 2016 however [Minister Carolyn Bennett announced at the UN Permanent Forum](#) that Canada was now a “full supporter of the Declaration without qualification” and that the government intended “nothing less than to adopt and

implement the declaration in accordance with the Canadian constitution.” Finally, in November 2017, the government of Canada [announced that it would support](#) the adoption of Bill C-262.

The current federal government also references the Declaration in its [Overview of a Recognition and Implementation of Indigenous Rights Framework](#) and the [Principles Respecting the Government of Canada’s Relationship with Indigenous Peoples](#) which state *inter alia* (at 3) that:

The implementation of the *United Nations Declaration on the Rights of Indigenous Peoples* requires transformative change in the Government’s relationship with Indigenous peoples. The UN Declaration is a statement of the collective and individual rights that are necessary for the survival, dignity and well-being of Indigenous peoples around the world, and the Government must take an active role in enabling these rights to be exercised. The Government will fulfil its commitment to implementing the UN Declaration through the review of laws and policies, as well as other collaborative initiatives and actions. This approach aligns with the UN Declaration itself, which contemplates that it may be implemented by States through various measures.

Implementation of the Declaration is also consistent with the [Calls to Action](#) of the Truth and Reconciliation Commission:

43. We call upon federal, provincial, territorial, and municipal governments to fully adopt and implement the United Nations Declaration on the Rights of Indigenous Peoples as the framework for reconciliation.

44. We call upon the Government of Canada to develop a national action plan, strategies, and other concrete measures to achieve the goals of the United Nations Declaration on the Rights of Indigenous Peoples.

As noted above, Bill C-262 was introduced into the House by NDP MP Romeo Saganash, a Cree from Northern Quebec, as a private member’s bill. It is unusual for a government to support a private member’s bill, especially a bill introduced by a member of an opposition party, and especially a bill dealing with such an important policy issue. Carrying the bill forward as a private member’s bill rather than a government sponsored measure has certain implications. First, there is a limited time allotted to the debate of a private member’s bill. Second, the bill cannot be a money bill i.e. it cannot provide for the appropriation of funds. Third, no Minister of the Crown will speak directly to the bill or answer questions about it. And fourth, the bill will not be drafted by the drafting group of the Department of Justice.

Bill C-262 was introduced in 2016 and received second reading in February 2018 after which it was sent to the Standing Committee on Indigenous and Northern Affairs for its consideration. That Committee held hearings on the Bill between February and May 2018 and reported the Bill out without amendment. Bill C-262 was passed by the House of Commons on May 30, 2018. The bill was supported by the Liberal and NDP parties and other smaller parties but opposed by Conservative members. The vote details are [here](#).

### **Part III: Bill C-262**

Bill C-262 comprises a nine-paragraph preamble, six operative sections (including one section which provides the short title of the Act) and a Schedule which consists of the Resolution adopted by UNGA and its attached Annex which is the actual Declaration.

I begin by repeating the long title of the Act: “An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples.” This title suggests a progressive agenda rather than a statement of declaratory effect. What I mean by that is that it suggests a *process* by which the laws of Canada will be brought into harmony with the Declaration.

I think that two provisions of the Preamble are also important in this context. By the first paragraph “the Parliament of Canada recognizes that the principles set out in the United Nations Declaration on the Rights of Indigenous Peoples should be enshrined in the laws of Canada.” I call attention to two elements of this paragraph. First it is normative: “should be enshrined.” Second, that which is to be “enshrined” is not the text of the Declaration itself but “the principles” set out in the Declaration. The seventh clause of the Preamble also speaks to the idea that the Act endorses an agenda. This provision notes that “Canada is committed to taking appropriate measures — including legislative, policy and administrative measures — at the national and international level, in consultation and cooperation with indigenous peoples, to achieve the ends of the United Nations Declaration on the Rights of Indigenous Peoples and to follow up on its effectiveness.” What seems important here is the reference to an ongoing process of “taking appropriate measures” and to the objective of achieving “the ends” of the Declaration. Much like the reference to “the principles” in the first paragraph of the preamble “the ends” must refer to something other than the actual provisions of the Declaration.

Now we can move to the operative provisions of the Bill.

After the short title which omits the harmonization objective (i.e. the short title is simply the *United Nations Declaration on the Rights of Indigenous Peoples Act*), section 2 is headed “aboriginal and treaty rights.” Subsection 1 is a common clause in federal legislation. It confirms that the Act is not intended to “diminish or extinguish” the rights recognized and affirmed by section 35 of the *Constitution Act, 1982*.

The second subsection is more interesting for present purposes insofar as it provides that nothing in the Act shall “be construed as delaying the application of the United Nations Declaration on the Rights of Indigenous Peoples in Canadian law.” This confirms that the Act is not ‘the only show in town’ and that there are other normative processes at work that might result in “the application” of the Declaration “in Canadian law.” I refer to some of these processes below.

Sections 3 – 6 form the heart of the Bill, but whereas section 3 is declaratory in nature, sections 4 – 6 are much more process oriented, future oriented and relationship oriented.

### **Section 3**

Section 3 is a declaratory statement as to the legal effect of the Declaration. It proclaims that the Declaration is “hereby affirmed as a universal international human rights instrument *with application in Canadian law*” (emphasis added) or in French “et trouve application au Canada” (literally, finds application in Canada – but with no reference to law or *les lois*.) This provision is quite unlike any other provision in a federal statute dealing with the implementation of an international agreement or commitment. My review of federal legislation shows that parliament

has used all sorts of different terms when signaling an intention to give effect to an international agreement in Canadian law but perhaps the most common formulation is to the effect that “The Convention is approved and has the force of law in Canada ...” One sees this formulation, for example, in the legislation implementing Canada’s tax treaties but also in the *Carriage by Air Act*, [RSC 1985, c. C-26](#) (implementing the *Convention for the Unification of Certain Rules Relating to International Carriage by Air*, Warsaw, October 12, 1929 and the *Supplementary Convention*) and in the *Marine Liability Act*, [SC 2001, c. 6](#) (implementing *inter alia* the *Athens Convention relating to the Carriage of Passengers and their Luggage by Sea*, December 13, 1974 and the *International Convention on Civil Liability for Oil Pollution Damage*, November 27, 1992). Perhaps the most explicit and far-reaching is the *International Boundary Waters Treaty Act*, [RSC 1985, c. I-17](#) that implements the Boundary Waters Treaty of 1909. Section 3 provides that:

The laws of Canada and of the provinces are hereby amended and altered so as to permit, authorize and sanction the performance of the obligations undertaken by His Majesty in and under the treaty, and so as to sanction, confer and impose the various rights, duties and disabilities intended by the treaty to be conferred or imposed or to exist within Canada.

This context gives rise to at least two questions with respect to section 3 of Bill C-262. The first question is whether the language “with application in Canadian law” serves to incorporate the Declaration into Canadian law. The second question (if we conclude in the negative with respect to the first question) is what is the effect of the language if it does not incorporate the Declaration into Canadian law? What other legal effect might it have?

*Does the language “with application in Canadian law” serve to incorporate the Declaration into Canadian law?*

I begin by stipulating what I mean by “incorporate the Declaration into Canadian law.” For me, it would mean that the Declaration would have the same legal effect as a federal statute or regulation and might create rights and obligations for the government of Canada and citizens (depending upon the language of any particular provision). It might also, in an appropriate case, create a cause of action that could be vindicated in a court. I take it that that is what parliament means when it says in other contexts that this “Convention has the force of law in Canada.”

Defining incorporation this way leads me to conclude that the language “with application in Canadian law” cannot in and of itself transform the Declaration into Canadian law or incorporate it into domestic law. I have four reasons for that conclusion. First, and as the Supreme Court of Canada has recently reaffirmed, “Incorporation by reference requires clear language” (*Reference re Pan-Canadian Securities Regulation*, [2018 SCC 48](#), at para 51). Second, Parliament must be taken to be cognizant of the range of terms that have been used in other federal statutes when the goal is to give the international agreement (or indeed even a land claim agreement, see for example, the *Nunavut Land Claims Agreement Act*, [SC 1993, c 29](#), section 4) the force of law. Those other terms (as quoted above) are much more explicit as to the intended legal effect than the words “with application in Canadian law.” Third, read as a whole, including the preamble and the process-oriented provisions that follow section 3, the intent of the Bill is to establish the Declaration as a standard against which to measure Canadian laws and to bring those laws into conformity with the Declaration over a period of time. It is not the intent of the Bill to make the Declaration law, as of the date that the bill itself attains the force of law. Another way to put this

point is that if section 3 is read as making the Declaration immediately a part of Canadian law there would be little need for the conformity analysis (section 4) and the action plan (section 5). Fourth, and I say this with some diffidence given my poor command of the language, the French text, with the absence of any reference to law, makes it even harder to argue that the bill will make the Declaration part of the law of Canada.

*If the language “with application in Canadian law” does not serve to incorporate the Declaration into Canadian law what is the legal effect of this language?*

I think that the best way to answer this question is to first ask what use Canadian courts and tribunals have made of the Declaration up to this point? We can then ask how the “with application” language might change or clarify matters.

The Declaration has been referred to in over 50 court cases and about 15 tribunal decisions in Canada. It has also been referenced in four statutes: two Ontario statutes, one federal statute and one Manitoba statute, Manitoba’s *Path to Reconciliation Act*, [CCSM c. R 30.5](#), which called upon the responsible minister to develop a “strategy for reconciliation” guided by the calls to action of the Truth and Reconciliation Commission and principles set out in the Declaration (and see *Manitoba Metis Federation Inc. v. The Government of Manitoba et al.*, [2018 MBQB 131](#)). The Declaration is also referenced in British Columbia’s [Bill 51 – 2018, Environmental Assessment Act](#) and in the preamble of [Bill C-69, An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts](#) currently being debated on [second reading in the Senate](#).

The cases have dealt with a wide variety of issues including adoption, self-government, control of funds, duty to consult, education, medical treatment and discrimination. This is not the place to canvass those cases in any detail, but I think that we can discern two lines of authority in the cases with respect to the use of the Declaration as a relevant normative instrument to be taken into account when interpreting statutory or constitutional provisions.

On the one hand, there is a line of cases that emphasize that the Declaration is merely a declaration and not a treaty and that while Canada might have endorsed the Declaration, in doing so it declared that it was both aspirational and not customary law and therefore not something that a court should rely upon. Perhaps the clearest example of this approach is Justice Hinkson’s 2014 decision in *Snuneymuxw First Nation v. Board of Education – School District #68*, [2014 BCSC 1173](#). In that case the Snuneymuxw First Nation sought to question the validity of a School Board order closing certain schools in a way that affected educational opportunities for First Nation students. The case was in large part a procedural fairness and duty to consult case, but the First Nation also referenced Articles 14, 18, 19 and 23 of the Declaration. Justice Hinkson however (at para 59) was not prepared to accept the relevance of the Declaration:

At the outset, I must state that I am unable to accept the reliance placed by the petitioners upon the Declaration. The Declaration has not been endorsed as having legal effect by either the Federal Government or the Courts. Canada is a signatory to the UNDRIP, but has not ratified the document. The Federal Government, in announcing its signing of the Declaration, stated that the Declaration is aspirational only and is legally a non-binding document that does not reflect customary international law nor change Canada’s domestic laws. This fact has

been recognized by Canadian courts in considering the application of the Declaration, as well as the fact that the document is too general in nature to provide real guidance to courts ....

Even if this sentiment is now perhaps less commonly articulated we do have a fairly recent decision of the Yukon Supreme Court *Ross River Dena Council v. Canada*, [2017 YKSC 59](#), declining to use the Declaration to inform the interpretation of a constitutional document (in that case the 1870 Imperial Order in Council dealing with the interpretation of a provision in the *Rupert's Land and North-Western Territory Order* authorizing the admission of Rupert's Land and the North-Western Territory into the new Dominion of Canada).

On the other hand, there is another line of cases which has already embraced the Declaration. Justice MacTavish's early decision in *Canada (Human Rights Commission) v. Canada (Attorney General)*, [2012 FC 445](#), demonstrates the potential warmth of this embrace. In that case Justice MacTavish concluded that it was possible to look at the Declaration for three purposes: (1) to prefer an interpretation of a statute (in that case the *Canadian Human Rights Act*) that is more consistent with Canada's international obligations, (2) to inform the contextual approach to statutory interpretation, and (3) to identify values and principles that should inform the interpretation of the legislation. See also *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (Minister of Indigenous and Northern Affairs Canada)*, [2018 CHRT 4](#).

In sum, it might be said that a consensus has yet to emerge from the case law as to the normative weight that should be accorded to the Declaration.

With that as background we can now return to the question as to the legal implications of the "with application in Canadian law" language of section 3.

I think that if section 3 is enacted it will be impossible for a Court or tribunal to take the nihilistic approach of Justice Hinkson and deny outright the normative relevance of the Declaration. Making the Declaration "with application" will allow, and indeed *require*, a court to use the Declaration for all of the purposes referenced by Justice MacTavish and with respect to statutes, regulations and constitutional doctrines. Furthermore, since the section references the Declaration as a whole, I do not think that it should be necessary for a Court to inquire as to whether a particular provision of the Declaration represents customary international law. In enacting this language, parliament must be taken to have endorsed the domestic relevance or applicability of the entire text of the Declaration whatever its status in international law.

What might this mean in practice? Here are three possible examples of how we might expect to see the Declaration used. First, consider the *R v Van der Peet*, [\[1996\] 2 SCR 507, 1996 CanLII 216 \(SCC\)](#), and *R v Pamajewon*, [\[1996\] 2 SCR 821, 1996 CanLII 161 \(SCC\)](#), line of cases. Might it not be possible to use the Declaration to argue that the Court's "integral to the distinctive culture" test represents too narrow a view of the rights of Indigenous peoples as peoples entitled to internal self-determination and a degree of autonomy (see the Declaration generally and specifically Articles 3 and 4)?

Second, if the Declaration were of application in Canadian law when *Mikisew Cree First Nation v Canada (Governor General in Council)*, [2018 SCC 40](#) was decided earlier this year, it would

be difficult for the Supreme Court to conclude, as it so readily did, that the duty to consult has no application in the parliamentary process. After all Article 19 of the Declaration directs that:

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

And finally, we will need to find some way of reconciling current articulations of the duty to consult and accommodate with the apparently more demanding duty under Article 32(2) of the Declaration to “consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.” There was much discussion of this challenge in the Committee hearings with many witnesses emphasizing that the duty to seek to obtain free, prior, and informed consent (FPIC) was not the legal or moral equivalent of a veto. Perhaps one way ahead here, as suggested by some witnesses in the Committee hearings is to recall the text of Article 46(2) which hints, as does the Supreme Court’s judgment in *Tsilhqot’in Nation v British Columbia*, [2014 SCC 44](#), at the need to work through a justifiable infringement analysis should it not be possible to obtain consent. But, if we’re serious about reconciliation the justifiable infringement analysis must be more than a majoritarian public interest analysis (apparently endorsed in both *Delgamuukw v British Columbia*, [\[1997\] 3 SCR 1010](#), [1997 CanLII 302 \(SCC\)](#), and *R v Gladstone*, [\[1996\] 2 SCR 723](#), [1996 CanLII 160 \(SCC\)](#)) and must draw on the values and laws of the affected First Nation or other Indigenous communities as Chief Justice Finch recognized in *West Moberly First Nations v British Columbia (Chief Inspector of Mines)*, [2011 BCCA 247](#) at paragraphs 141 – 150 (albeit in the context of a proper understanding of the duty to consult).

## Sections 4 - 6

As noted above, sections 4 and 5 are much more process oriented and future oriented than section 3. Both demand that the Government of Canada act “in consultation and cooperation with indigenous peoples.” Section 4 instructs the Government of Canada that “it must,” in consultation and cooperation with indigenous peoples “take all measures necessary to ensure that the laws of Canada are consistent with” the Declaration. This obligation applies to both existing laws and regulations but it must also apply to proposed new laws and regulations. It is effectively an instruction to decolonize Canada’s laws and regulations at the federal level. This will be a major undertaking and considerable thought will need to be given to structuring an appropriate process that does in fact involve “consultation and cooperation” with indigenous peoples. What might this look like? Could it perhaps be structured in the form of a law reform commission with commissioners drawn from different backgrounds and with different representational responsibilities (and a multi-year mandate to carry out its task)? Evidently, decisions as to the appropriate structure will themselves require “consultation and cooperation” and indeed co-development as some witnesses put it in testimony to the Standing Committee.

With respect to future laws and regulations there was reference in the Committee debates to the existing section 4.1 of the *Department of Justice Act*, [RSC 1985 c. J-2](#) (and see also *Charter of Rights and Freedoms Examination Regulation*, [SOR/85-781](#) and the *Statutory Instruments Act*, [RSC 1985, c. S-22](#), s 3(2)(c)). This provision requires the Minister of Justice to “examine every



regulation transmitted to the Clerk of the Privy Council for registration pursuant to the *Statutory Instruments Act* and every Bill introduced in or presented to the House of Commons by a minister of the Crown, in order to ascertain whether any of the provisions thereof are inconsistent with the purposes and provisions of the *Canadian Charter of Rights and Freedoms* and the Minister shall report any such inconsistency to the House of Commons at the first convenient opportunity.” While this is a potential model it is not on its face a model that contemplates “consultation and cooperation.”

Section 5 instructs the Government of Canada again in consultation and cooperation with Indigenous Peoples to develop and implement a national action plan “to achieve the objectives” of the Declaration. This too will require considerable effort and allocation of resources. Unlike the consistency analysis required by section 4, section 5 is not concerned with the laws of Canada. Instead, it is concerned more generally to ensure that the objectives of the Declaration are being attained. There will be room for debate as to how to elicit the objectives of the Declaration. But surely one key objective is to ensure that Indigenous Peoples are able to effectively exercise the rights recognized by the Declaration. This brings me back to a point I made earlier with respect to the drafting of the Declaration. There, I noted that many of the provisions of the Declaration both articulate a right but then go to describe the State’s correlative obligations in terms of the effective measures that the State must undertake to ensure full enjoyment of the right. This might be a suitable focus for an “action plan.”

Finally, section 6 requires the Minister to submit a report to the House and the Senate on the implementation of the government’s obligations under sections 4 and 5 for each of the next 20 years, specifically the “measures” referred to in section 4 and the action plan referred to in section 5. This is evidently a transparency and accountability measure since tabling in both Houses provides the opportunity for questions and debate.

The emphasis on procedure in sections 4 and 5 and the accountability mechanism referenced in section 6 leads to the question as to whether or not the obligations assumed by the Government of Canada and by the Minister in these sections are justiciable. To be clear, I think that section 3 is justiciable and that courts will have to decide what the words “with application in Canadian law” mean. This will inevitably also lead the courts to interpret different provisions of the Declaration. But as I have also already indicated, sections 4 and 5 combined with section 6 stand on a different footing and in my view at least some of the elements of those sections are likely *not* justiciable. For example, if a party were to argue that a national action plan failed to further the attainment of the objectives of the Declaration, I doubt that a court would hear the case.

The most pertinent authority on justiciability in this context is the Federal Court’s decision in *Friends of the Earth v Canada* [2008 FC 1183](#). In that case Friends of the Earth sought declaratory and mandatory relief against Canada with respect to certain obligations arising under the *Kyoto Protocol Implementation Act*, [SC 2007, c. 30](#) (now repealed). This too came to life as a private members bill. Amongst other things it imposed an obligation on the government to prepare an annual Climate Change Plan providing a description of measures that would be taken to “ensure that Canada meets its obligations” under the Kyoto Protocol (KP). The Plan was to be tabled in the House of Commons and provided to the National Round Table on the Environment and the Economy (NRTEE) for its advice. In addition, every two years the Commissioner of the Environment and Sustainable Development was required to report on such Plans. Both the NRTEE and the Commissioner were asked to advise with respect to progress in meeting KP

obligations. The government prepared a plan, but the plan made it clear that the government of the day had no intention of meeting its KP obligations. The preliminary question for the Court was whether the duty to prepare a report that “ensured” KP compliance was a justiciable duty.

In answering that question Justice Barnes at first instance emphasized that within a constitutional scheme of the separation of powers, the question at the heart of justiciability was whether it was appropriate in the particular case that a court involve itself in assessing of the behavior of the legislative branch. In some cases, the legislation reveals an intention that Parliament has reserved to itself the sole enforcement role. That was the case here and there were several indicators of that. While a complete failure to provide a report might have been justiciable, the contents of that report were not since many of the issues that the report was required to address did not admit of a legal assessment. While some issues might, Justice Barnes concluded it was not appropriate for the court to parse the requirements into justiciable and non-justiciable requirements. Furthermore, the overall structure of the legislation and its reporting and assessment requirements made it clear that this was a case in which the Act contemplated parliamentary and public accountability. In oral reasons the Federal Court of Appeal agreed and dismissed the appeal for substantially the reasons given by Justice Barnes (*Friends of the Earth v Canada (Environment)*, [2009 FCA 297](#)).

I think that there are several reasons for thinking that a Court would reach the same conclusions with respect to the obligations under sections 4 and 5 of Bill 262. Perhaps most significantly, on its face, section 6 of the Bill contemplates Parliamentary accountability for the obligations to engage in a consistency analysis and to engage in a national action plan, insofar as the Minister is to report to both the House of Commons and the Senate on the implementation of the measures under section 4 and the plan referred to in section 5.

## **Conclusion**

My overall assessment is that Bill 262 strikes a judicious balance between substance and process and as such will make a measured contribution to the debate and actions necessary to achieve reconciliation. At the substantive level (i.e. the legal effect to be accorded the Declaration) the text (section 3) is soft. If I am correct in my interpretation, the Act will not give the Declaration the force of law in Canada but it will serve to ensure that the Declaration can and must be used by courts and tribunals to interpret and inform statutes, regulations and constitutional doctrine. At the level of process, sections 4, 5 and 6 offer the promise of systemic and systematic change. Whether that promise will be realized will depend very much on how the two processes (the consistency analysis and the action plan) develop and the extent to which the necessary resources are available for implementation. It will also be important to understand how the processes contemplated by Bill C-262 will mesh with the government’s own initiatives mentioned above (see the Overview and Principles documents).

Of course, Bill C-262 is principally concerned with federal laws and regulations. It remains to be seen how the different provinces and territories will respond to the challenge laid down by the Truth and Reconciliation Commission.

Thanks to my colleagues Robert Hamilton, Sharon Mascher, Martin Olszynski and David Wright for their helpful comments on an earlier draft of this post.

---

This post may be cited as: Nigel Bankes, “Implementing UNDRIP: some reflections on Bill C-262” (November 27, 2018), online: ABlawg, [http://ablawg.ca/wp-content/uploads/2018/11/Blog\\_NB\\_Bill\\_C-262\\_Legislative\\_Implementation\\_of\\_UNDRIP\\_November2018.pdf](http://ablawg.ca/wp-content/uploads/2018/11/Blog_NB_Bill_C-262_Legislative_Implementation_of_UNDRIP_November2018.pdf)

To subscribe to ABlawg by email or RSS feed, please go to <http://ablawg.ca>

Follow us on Twitter [@ABlawg](https://twitter.com/ABlawg)

